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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1294

JONES & LAUGHLIN STEEL CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 109–112)[1] is reported in 146 F. 2d 833. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 61–66, 84–90) are reported in 54 N. L. R. B. 679. The decision of the

[1] "Volume I—Transcript of Record," printed by petitioner and containing the pleadings before the Board, the decisions and orders of the Board, and the opinion of the court below, is herein referred to as "R." The volume printed by petitioner as an appendix to its brief in the court below is herein referred to as "P. A."

Board in a prior representation proceeding which forms part of the record in this case (R. 29–35, 37–38, 44–45) is reported in 47 N. L. R. B. 1272 and 51 N. L. R. B. 1204.

JURISDICTION

The decree of the court below (R. 168–170) was entered on March 16, 1945. The petition for a writ of certiorari was filed on May 19, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board, in the exercise of its discretion, may properly designate as appropriate a collective bargaining unit composed of licensed deck-officer personnel, including masters.

2. Whether, notwithstanding the fact that they are the highest-ranking representatives of management on the vessels, masters may properly be included in a single unit with mates and pilots, who are second-ranking management representatives and who share with the masters a common interest in working conditions.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat.

449, 29 U. S. C., Sec. 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 20–22.

STATEMENT

In a proceeding under Section 9 (c) of the Act for the investigation and certification of representatives, instituted by National Organization of Masters, Mates and Pilots, Local 25, affiliated with the American Federation of Labor, the Board, after a hearing, issued a decision and direction of election finding that the masters, mates and pilots, who together comprise the licensed deck-officer group on petitioner's riverboat vessels, constituted a single appropriate bargaining unit (R. 17–19, 29–35). At the election, the petitioning union was selected by a majority of the eligible employees in the designated unit and was certified by the Board as the exclusive bargaining representative of the licensed deck officers on petitioner's vessels (R. 36, 37–38). The Board thereafter denied petitioner's motion to reconsider and to set aside the certification (R. 39–45).

Subsequently, in a proceeding under Section 10 (c) of the Act, the Board issued a decision finding that petitioner had refused to bargain collectively with the certified representative of its licensed deck officers and had thereby engaged in unfair labor practices within the meaning of Section 8 (5) and (1) of the Act (R. 63–66, 83–90). The Board issued an order requiring peti-

tioner to cease and desist from refusing to bargain collectively with the certified representative (R. 90–91). After appropriate proceedings, the court below, on January 18, 1945, decided that the Board's order should be enforced (R. 109–112) and on March 16, 1945, entered its decree enforcing the Board's order (R. 168–170).

The evidence in support of the Board's finding that the deck officers constitute an appropriate bargaining unit may be summarized as follows:

The masters, mates, and pilots are all supervisory employees and together constitute the deck-officer stratum on petitioner's vessels (P. A. 14a–15a, 19a). Together, they are responsible under federal regulations for the proper operation and maintenance of the vessel and must conform to similar standards of faithful performance of duty (46 U. S. C. 226, 228, 239). All three groups have comparable qualifications, training, and skills; perform similar operational functions on the vessels; and supervise and discipline the unlicensed crew (P. A. 14a–15a, 18a–19a; R. 32; *Matter of Jones & Laughlin Steel Corp.*, 37 N. L. R. B. 366). Appointment to any one of these positions is typically achieved by promotion from the rank below (P. A. 20a–21a). All three groups have for many years been eligible for membership in the certified union, which limits its jurisdiction to these classes of maritime personnel (P. A. 156a).

Although the master is the highest-ranking official on the vessel and endowed with a greater degree of responsibility for its maintenance and operation and for the discipline of the crew than are the mates and pilots, he is not a policy-making executive and does not participate in the formulation of labor-relations standards or employment conditions either for the other deck officers or for the unlicensed crew. On all 10 of petitioner's vessels he is under the close supervision of the home office, receiving instructions at the outset of the voyage and during its course and reporting to the home office upon its completion (P. A. 13a–14a, 17a–18a, 23a, 25a–29a, 32a, 180a–184a, 191a; R. 27–28). Seven of these vessels make round trips averaging from 32 to 48 hours; the other 3 make longer trips but are in frequent contact with the home office during the course of the voyage (*ibid.*). There is no evidence that the master has the power to hire or discharge other licensed deck officers. And his authority to hire and discharge unlicensed personnel is greatly limited and subject to the approval of the home office (P. A. 18a, 158a, 160a, 173a, 175a–176a, 186a–187a, 188a–190a). A master usually rises to that position after serving as mate or pilot; and will not infrequently sail as a mate or pilot even though licensed as a master (*Matter of Seas Shipping Company*, 8 N. L. R. B. 422, 423–424).

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Upon this evidence and in conformity with its established administrative policy of including masters in a single unit with mates and pilots, the Board found that the policies of the Act would best be effectuated by grouping masters in the same bargaining unit with mates and pilots (R. 32).

ARGUMENT

1. Petitioner contends that the Board exceeded the allowable limits of its discretion by including masters in a single unit with mates and pilots, urging that such grouping will hamper the masters in the performance of their duties as management representatives and consequently fails to effectuate the policies of the Act (Pet. 27–31).

The standard by which the Board is to be guided in formulating a finding as to appropriate unit in any case is that of insuring to the employees involved "the full benefit of their right to self-organization and to collective bargaining" and otherwise effectuating the policies of the Act (Section 9 (b)). The power to designate the unit appropriate for collective bargaining in any case is thus one which stems from the Board's discretion, consistently recognized to be of great latitude and to encompass specialized and expert knowledge in the field of labor relations. If, from the evidence or from its knowledge of the labor-relations structure as it bears upon the evidence, the Board has made its finding upon relevant con-

siderations which show a reasonable basis for its conclusion that the unit designated as appropriate will effectuate the policies of the Act, the finding will not be overturned on review. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, 134–135; *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586–587 (C. C. A. 2), certiorari denied, 313 U. S. 594; *National Labor Relations Board* v. *Clarksburg Publishing Co.,* 120 F. (2d) 976, 980 (C. C. A. 4); *National Labor Relations Board* v. *Chicago Apparatus Co.,* 116 F. (2d) 753, 755 (C. C. A. 7); *National Labor Relations Board* v. *Lund,* 103 F. (2d) 815, 819 (C. C. A. 8); *International Ass'n of Machinists* v. *National Labor Relations Board,* 110 F. (2d) 29, 34–35 (App. D. C.). To establish that a unit finding is arbitrary it must be shown that the unit designated is not reasonably related to the statutory objective of promoting effective collective bargaining and is without warrant in the evidence, or in prevailing and applicable labor-relations patterns, or in the settled customs of collective bargaining.

The Board's unit finding in this case, combining all licensed deck officers, including masters, for the purpose of collective bargaining and representation by a union admitting only such personnel, is one which was dictated by its judgment as to how

such classes of employees should be grouped for the most satisfactory realization of their statutory guarantees of concerted representation. While recognizing that the master is the chief management representative on the vessel, the Board considered that this circumstance alone was, in view of other relevant factors, insufficient to warrant his isolation from the mates and pilots for purposes of collective bargaining. Their common duty of maintaining efficient operation of the vessel and discipline among the crew; the essential similarity of their operational functions, skills, and qualifications; the same degree of loyalty, courage and efficiency required of all three by petitioner's rules and federal standards for faithful performance of duty; the interest of each class of officers in the working conditions of the other, engendered in the mates and pilots by the custom of rising to the rank of master and in the masters by the not infrequent necessity of having to sail as lower-ranking officers; and their eligibility for membership in the petitioning union are the factors which the Board considered as controlling in delineating the form of bargaining unit for the licensed deck officers. These facts showed them to be a cohesive group, who together represent management in the eyes of the crew and are closely allied by similar working conditions and skills in their welfare as employees. In addition, the union which petitioned for their representation in a combined unit had for many years been ad-

mitting all three classes to membership, thereby demonstrating the feasibility of bargaining for all three. The Board, consequently, in the exercise of its discretion, found that all three classes of officers could most fully enjoy their right to collective bargaining if grouped together in a single unit rather than if separated into two units, as now urged by petitioner. This Court has held that the formulation of a unit finding on evidence of similarity of function, skills and training, of a common interest in working conditions, and of general feasibility is sufficient to establish the reasonableness of the Board's finding. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111.

Petitioner's assertion that the Board abused its discretion by placing masters in a single unit with mates and pilots is based upon petitioner's belief that such association for collective bargaining will necessarily create a conflict of loyalties in the masters, dissipating their effectiveness as management representatives and thus bringing about a weakening of management controls—a consequence not contemplated by and, indeed, in conflict with the purposes of the statute (Pet. 27–28). But such an assumption, grounded upon no more than empty speculation, negates the basic philosophy of the Act and the experience out of which it grew. It was just such economic dislocation as petitioner fears that the Act was designed to cure by provid-

ing for orderly and effective collective bargaining through units which the Board in its expert judgment deemed most suitable and appropriate.[2] In deciding the question of appropriate unit in this case, the Board gave full consideration to petitioner's argument and found from the evidence and established tradition and practice that petitioner's misgivings were not only without reasonable support in reality but had also long since been dispelled by a well-defined history of maritime labor relations.

From the first year of its existence the Board has been confronted with the question of how various classes of maritime employees shall be grouped for collective bargaining. Careful consideration of the problems involved has led the Board to evolve a standard and consistent policy in the designation of appropriate units in the maritime trades.[3] In the cases involving masters,

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[2] In *Matter of Packard Motor Car Co.*, 61 N. L. R. B., No. 3, decided March 26, 1945, the Board has discussed and rejected the not infrequent contention of employers that organization for collective bargaining tends to impair efficiency.

[3] Thus the Board early formulated and has since consistently adhered to the policy of separating into different units licensed engineers and licensed deck officers on the ground of a basic difference in function and training between the two groups. *Matter of Delaware-New Jersey Ferry Company*, 1 N. L. R. B. 85; *Matter of Black Diamond Steamship Corporation*, 2 N. L. R. B. 241; *Matter of Panama Rail Road Company*, 2 N. L. R. B. 290; *Matter of Grace Line, Inc.*, 2 N. L. R. B. 369. At the same time, the Board initiated the practice of including within a single unit various levels of supervisory engineers on the ground that the general similarity of their

mates and pilots, the Board has, in reliance on established bargaining tradition by these groups as a unit [4] and in the light of the salutary experience developed by its own earlier decisions, uniformly designated as appropriate a single unit of masters, mates and pilots.[5] In a number of these cases, where the employer or the union requested the exclusion of the master on the ground

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skills, qualifications and functions gave them a common interest in working conditions. *Matter of International Mercantile Marine Company*, 1 N. L. R. B. 384; *Matter of Swayne & Hoyt*, 2 N. L. R. B. 282.

[4] Organization and collective bargaining of these three classes of officers have been accepted in the maritime industries for more than 40 years. Twentieth Century Fund, *How Collective Bargaining Works*, 1942, p. 938; H. E. Hoagland, *Wage Bargaining on the Vessels of the Great Lakes*, University of Illinois Studies in the Social Sciences, Vol. VI, No. 3, Urbana 1917.

[5] *Matter of Ocean Steamship Company of Savannah*, 2 N. L. R. B. 588; *Matter of New York and Cuba Mail Steamship Company*, 2 N. L. R. B. 595; *Matter of Seas Shipping Co.*, 8 N. L. R. B. 422; *Matter of Standard Oil Company of New Jersey*, 8 N. L. R. B. 936; *Matter of New York and Cuba Mail Steamship Company*, 9 N. L. R. B. 51; *Matter of Tide Water Associated Oil Company*, 9 N. L. R. B. 823; *Matter of Cities Service Oil Company*, 10 N. L. R. B. 954; *Matter of The Texas Co.*, 23 N. L. R. B. 1022; *Matter of A. H. Bull Steamship Co.*, 36 N. L. R. B. 99; *Matter of Carnegie-Illinois Steel Corp.*, 37 N. L. R. B. 19; *Matter of Jones & Laughlin Steel Corp.*, 37 N. L. R. B. 366; *Matter of Dravo Corporation*, 39 N. L. R. B. 846; *Matter of International Mercantile Marine Co.*, 1 N. L. R. B. 384; *Matter of Lykes Brothers Steamship Co., Inc.*, 2 N. L. R. B. 102; *Matter of Black Diamond Steamship Corp.*, 2 N. L. R. B. 241; *Matter of Swayne & Hoyt, Ltd.*, 2 N. L. R. B. 282; *Matter of Grace Line, Inc.*, 2 N. L. R. B. 369.

that he was the chief representative of management on the vessel, the Board, after analysis of the record and study of maritime bargaining experience, concluded that there was no reason to believe that the inclusion of masters in a single unit with mates and pilots was incompatible with the faithful performance of their duties by the masters.[6] And not inconsistent with this policy are the two cases in which the Board has excluded masters, not in deference to the assumption of incompatibility with faithful performance of duty but in conformity with its practice of not disturbing a bargaining pattern voluntarily and successfully developed by the parties before resorting to Board procedures.[7] *Matter of United States Lines Co.*, 28 N. L. R. B. 896; *Matter of Detroit and Cleveland Navigation Company*, 29 N. L. R. B. 176.[8]

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[6] Of the cases cited in note 5, *supra*, see *Matters of Seas Shipping Co., Standard Oil Company of New Jersey, New York and Cuba Mail Steamship Co., Tide Water Associated Oil Company, Cities Service Oil Company, The Texas Co., Carnegie-Illinois Steel Corp., Jones & Laughlin Steel Corp.*

[7] National Labor Relations Board, *Third Annual Report* (Gov't Print. Off., 1939), pp. 160–163; *Eighth Annual Report* (Gov't Print. Off., 1944), p. 53.

[8] *Matter of United Dredging Co.*, 30 N. L. R. B. 739, is incorrectly mentioned by petitioner (Pet. 20) as a case in which the Board excluded masters from representation in a unit with mates and pilots. The Board there excluded all supervisors, including masters, mates, engineers and others from a unit of unlicensed personnel.

This has continued to be the Board's practice, and it has been reexamined and unanimously reaffirmed from time to time by the Board in shaping its policy as to appropriate units for supervisors in other industries. *Matter of Union Collieries Coal Co.*, 41 N. L. R. B. 961, 966, 971; *Matter of Maryland Drydock*, 49 N. L. R. B. 733, 741, 743, 750; *Matter of Packard Motor Car Co.*, 61 N. L. R. B., No. 3, decided March 26, 1945. That the Board's expert judgment has been correct and that collective bargaining through a unit composed of masters as well as mates and pilots has in practice had none of the insidious results envisaged by petitioner may well be assumed from the failure during the past ten years of the maritime employers, or unions, or masters themselves to seek a revision of the all-inclusive unit designated for them by the Board on the ground that actual experience has shown that such grouping in fact impairs the master's efficiency as a management representative. This successful bargaining experience refutes petitioner's *a priori* judgment that the adherence of masters to the same unit as mates and pilots will necessarily weaken the effectiveness of management controls. In any event, petitioner is not without an adequate remedy should the unit found by the Board prove impracticable or detrimental to its interests, for the court below enforced the Board's bargaining order "without prejudice to an application to the Board

or to us to reopen the case should unusual difficulties in fact arise in the operation of this bargaining unit" (R. 112).

2. Petitioner contends that the decision of the court below is in conflict with *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 128 F. (2d) 130, decided by the Circuit Court of Appeals for the Third Circuit, with *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation* and *National Labor Relations Board v. Federal Motor Truck Company,* 146 F. (2d) 718, decided by the Circuit Court of Appeals for the Sixth Circuit, and with *National Labor Relations Board* v. *E. C. Atkins and Company,* 147 F. (2d) 730, decided by the Circuit Court of Appeals for the Seventh Circuit (Pet. 22–26).[9] The Board perceives no conflict between the decision of the court below and the decisions in the cases cited by petitioner. While the issue in the instant case bears a superficial resemblance to the others in that in all the broad question presented for review below was the propriety of a unit finding made by the Board, the issues decided by the court below and here presented by petitioner are as to all material facts substantially different from those involved in the other cases.

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[9] In the last three cases cited this Court, on June 4, 1945, granted writs of certiorari, vacated the judgments and remanded the cases to the circuit courts of appeals for further proceedings.

In the *Delaware-New Jersey* case, the Board had found as appropriate a single unit comprising captains and other licensed officers as well as unlicensed crew personnel. The court held that the commingling of officers with ordinary members of the crew was contrary to the public interest, as the conflict of loyalties which such common grouping might engender in the officers placed the faithful performance of their duties and the interests of the public in possible jeopardy. It therefore overturned the Board's unit finding—not, as the petition might lead this Court to suppose, because captains or masters were placed in a unit with other licensed deck officers, but because they and the other licensed deck officers were included in a single unit with the unlicensed crew. The Board's unit finding in the instant case is plainly in accord with the court's decision in the *Delaware-New Jersey* case, for here the Board separated out the licensed officers and designated them as a unit apart from the crew over whom they exercise supervision. Indeed, this unit delineation more than satisfies the requirement of that court that the officers be segregated from the crew in collective bargaining, for here the union representing the deck officers, including the masters, limits its membership and representation to licensed deck officers and is not even affiliated with the same parent organization which represents the engineers and the crew (P. A. 33a–34a, 156a).

In the *Jones & Laughlin, Federal Motor Truck* and *Atkins* cases the employees involved were militarized plant guards. Although the companies in those and similar cases involving guards had contended to the contrary, it is clear that the guards are not supervisory employees, and the courts in those cases did not hold that they were. The problem presented in those cases was thus not the same as in the case at bar.

Moreover, in the *Jones & Laughlin* and *Federal Motor Truck* cases, the Board found as appropriate for each plant a single, separate unit composed of the militarized plant protection force and certified as their representative a union which also represented, in another unit, the production and maintenance employees (Board pet. for writ of certiorari in Nos. 1236, 1237, 1238, filed with this Court May 5, 1945, p. 13). The court held that due regard for wartime security rendered improper the certification of a representative which also bargained for the production and maintenance workers (*ibid.*). In the instant case, the union certified by the Board as bargaining representative for the unit found appropriate is one which limits its membership to the classes of employees who constitute the unit, is affiliated with the American Federation of Labor, and does not bargain for the remaining personnel on the vessels, who are in turn represented in two separate units by affiliates of the Congress of Industrial Organizations (*Matter of Jones & Laughlin Steel Corporation,* 37 N. L. R. B. 366, 368–369).

The court below considered the decisions of the Circuit Courts of Appeals for the Third and Sixth Circuits and found no conflict between them and its decision in the instant case (R. 110, 112).

In the *Atkins* case, decided after the instant case, the court held that militarized plant guards are not "employees" within the meaning of the Act and are, therefore, not subject to the Board's power to designate appropriate units for collective bargaining.[10] Petitioner has never contended, nor does it now contend, that its masters are not employees for purposes of the Act.

The Board believes that petitioner's contention of conflict stems from a misconstruction of the decision and opinion of the court below. Petitioner assumes that the Board and the court below accepted as a fact the unsupported allegation in its motion to adduce (R. 96–103) that the three unions representing respectively the masters, mates and pilots, the engineers, and the unlicensed personnel have so amalgamated their leadership and functions as to constitute for all practical purposes a single organization (R. 101–102). Were petitioner's assertion in fact correct, it is conceivable that there might perhaps be said to exist the conflict which petitioner now claims to see. If the licensed officers were, by arrangement of the unions, joined together in a bargaining unit

[10] The *Atkins* decision in the Circuit Court of Appeals also approved the reasoning of the Sixth Circuit in the *Jones & Laughlin* and *Federal Motor Truck* cases.

with the unlicensed personnel and the court below accepted this as fact but nevertheless upheld the Board's unit finding, the decision in this case might then possibly be viewed as contrary to that in *Delaware-New Jersey*. And, more remotely, if militarized plant protection employees were considered to be indistinguishable from masters of vessels; if mates, pilots, engineers and unlicensed seamen were regarded as no different from production and maintenance employees in an industrial plant; and if the union certified by the Board for the masters as well as the mates and pilots had in fact been proved to represent also the other classes of maritime personnel, a conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the plant protection cases might be said to exist.

But the Board, in opposing the motion to adduce, and the court below, in denying the motion, agreed that the allegations made by petitioner in support of its conclusion that the three unions were in fact one did not, even if they were assumed to be true, establish that conclusion (R. 111–112).

CONCLUSION

The decision of the court below is correct. While involving questions of general importance, it gives rise to no conflict of decisions and merely sustains an exercise by the Board of discretionary powers which this Court has recognized that Con-

gress conferred on the Board. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1945.